

UNITED STATES COURT OF APPEALS

FOR THE NINTH CURCUIT

PHILIP J. KENNEY,)
)
Appellant,)
)
vs.)
)
AMERICAN CAN COMPANY,)
a corporation,)
)
Appellee)

No. 22236

APPELLANT'S ANSWER BRIEF

Appeal from the United States District Court

for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

Philip J. Kenney, Appellant
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Portland, Oregon 97236
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PHILIP J. KENNEY,)
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 Appellant)
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 vs.)
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AMERICAN CAN COMPANY,)
 a corporation,)
)
 Appellee)

No. 22,236

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was based upon diversity of citizenship and 28 U.S.C.A., Sec. 1332. The complaint alleges a controversy exceeding \$10,000 between plaintiff, a citizen of Oregon and the defendant, a corporation incorporated under the laws of the State of New Jersey, having its principle place of business in a state other than the State of Oregon, and authorized to do business in Oregon.

STATEMENT PERTAINING TO ERRORS

The appellant is at a loss as how to make out a list of errors under the circumstances where the case was dismissed with prejudice and consequently was not heard in detail or on its merits.

The Appellant can only contend that in his opinion several of the findings of fact as prepared for the court at the court's direction (Appellee's Brief, p. 4) are in error.

The findings of fact that the Appellant believes are in error, completely or in part are listed as follows:

Parts I, II, V, VII, VIII, IX, X, XI, XV, XVII, XVIII, and XIX.

These are believed to be answered generally in the subject material contained in the Appellant's Answer Brief.

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Appellee

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APPELLANT'S ANSWER BRIEF

In answer to the Appellee's brief, the Appellant will try to cover the subject matter that is basic to the complaint in a question and answer form rather than trying to answer page by page or in verbatim.

It is thought that the basic questions and concluding facts of this issue are comparatively uncomplicated. The Appellant will endeavor to eliminate a lot of unnecessary explanation of seemingly repetitious material by using a form of question and by attempting to keep the answers in line with the above forecast. The Appellant is not trying to be factitious, but because of his lack of formal education finds it impossible to give any kind of comparable answer to the beautifully composed brief of the Appellee.

Beginning in the prefatory of the Appellee's brief, some doubt seems to exist as to the validity of the Appellant's statement that he is not representing himself by choice but rather through necessity, while at the same time expressing concern (seemingly) for the Appellant's plight. If this concern is sincere it is commendable. However, no such concern existed when the court below suggested the appointing of a master prior to the trial, but then withdrew the offer upon the objection of the Appellee. The Appellant

ceased trying to secure legal counsel after it became apparent to him that no ethical attorney would handle it on his own and apart from the appellant's legal counsel of whom he had terminated his contingency contract. This seemingly created an impasse, which left the appellant no alternative but to bring his grievance into the courts himself. The grounds upon which the appellant bases this assumption will be disclosed to the court if necessary.

In the third paragraph of the appellee's prefatory, further concern is shown in regard to possible prejudice arising from insufficiencies supplied by both the appellee and the a-pellant (inadvertantly of course) in presenting of his appeal in part or parcel. This too is noteworthy, but just what has caused this concern is not quite clear to the appellant, because appellant's complaint in the court below was dismissed with prejudice and consequently appellee has found much valuable support from it as can be seen in appellee's brief. The Appellant fails to find any mention in appellee's brief that the court below dismissed the appellant's case with prejudice but appellee does say (at one place, last paragraph, p. 3, A. b.) *The court below dismissed the complaint on particular but sufficient grounds.* So while this last concern is warming on one hand, it is seemingly confusing to the appellant on the other.

In reference to and in answer to appellee's inference to appellant's possible criticism of the findings of the court below, may it be unequivocally understood that the appellant in no way criticises the court below, but quite to the contrary. True, the appellant disagrees with the finding but certainly can understand that inadvertently he contributed hereby to his own misfortune. The appellant is grateful that the court below was tolerant enough not to dismiss his complaint before it was heard or, in his opinion, he would have been in real difficulty.

The appellee's basic facts referred to and answered in this brief, which the appellant has elected to put into the form of questions and answers, believing that this will enable him to better present his complaint and reason for redress, are presented in the following:

1. Did not the appellee incur a duty owed the appellant in regard to his August 1955 disclosure by the identifying statement in the January 9, 1956 letter of determination that both the August 1955 and the November 1955 disclosures were *substantially the same*? That is to say, did this not amount to extending the same stipulated conditions of agreement that covered the formally accepted November 1955 disclosure, to cover the August 1955 by implied consent?

2. Is it not reasonable to conclude, upon review of the circumstances surrounding the submitting of the disputed August 1955 disclosure, that as one aspect of the above mentioned duty, it was the right of the appellant to expect a trust of his property which was not again disclosed after a misunderstanding had arisen? Therefore, it can clearly be seen it was not to be considered further. Would not a breach of trust arise also as a result of the breach of contract?

3. Appellee asserts (but the appellant denies) that the appellant has shown *only* a two part - tear tape constructure in the August 1955 disclosure and that this is the way the appellee's attorney employee read it, thus creating the pivot question upon which the other gives rise.

Answer to #1.

The appellee's attorney employee's statement in the January 9, 1956 letter of determination, wherein it says: *It now appears that your suggestion is substantially the same as that which you had earlier submitted informally.*

(P.T.O., p. 9, R 53) created and implied agreement subject to any part or parcel of the stipulation of the formally accepted agreement that the appellant chooses to invoke, the appellee's failure to secure for itself any reservation as to this implied agreement cannot now institute any defense derived therefrom to rectify its unauthorized use of the appellant's personal property which was in the care and owed trust of the appellee.

Because of this implied agreement on the part of the appellee and the resulting waiver of any right it would otherwise have, one cannot now rely on patents or any other thing in the public domain for a defense.

The ascertained proof of use of appellant's property as contained in the appellee's brief (p. 27, paragraph 1) lies in the old adage "the proof is in the pudding", namely that a sealing strip easy opener adhered to the can such as the appellee is using was suggested and disclosed to the appellee in the appellant's August 1955 submissions. And the unauthorized use whether it was advertantly accomplished or in advertantly still constitutes an unauthorized appropriation of the appellant's material resulting in a breach of contract, as well as a violation of the trust that appellee necessarily assumed.

Answer to #2.

It is not unreasonable for the appellant to have expected the appellee to regard with trust the appellant's personal property that was not released to it but rather was exposed to it under improper circumstances unintentionally. There was no occassion for the appellant to try to establish a knowledgeable confidential relationship because there was no reason at the time for appellant to mistrust the appellee. The appellant simply assumed that by not disclosing it again formally, and in which the appellant left out any reference to

adhering it to the can body and can top, but instead elaborated on the flange securement concept and specified at the beginning of the November 1955 letter of disclosure that: *I am submitting this letter to explain my new idea in place of the letter of explanation dated August 9, 1955.* (P.T.O. p. 7, R 51) In spite of all this and the contention at the start notwithstanding, the appellee's knowledge concerning the seriousness of a confidential relationship, it still went ahead and reviewed, evaluated and commented on subject matter that was not released to it. This reiterates the appellant's contention that, in view of the above circumstances, it is not unreasonable for the appellant to assume a relationship of trust was due and existed from the appellee in regard to that part of the August 1955 material in dispute. Thus a breach of said trust incurred by appropriating something that belonged to the appellant when it had no authority to do so.

Answer to #3.

In answer to this pivot statement, as termed by the appellant, the appellant shall attempt to establish the fact that appellee has misconstrued said disclosure of August 1955, which is shown out of context (appellee's Brief, p. 20).

The fallacy of the appellee's statement that the appellant shows *only the two-part tear-tape constructure* (Appellee's Brief, p. 23) and was read as such by the appellee's attorney employee, a Mr. George W. Rieber, is contradicted and refuted in a comment by Mr. Rieber in his letter of October 26, 1955 (P.T.O. p. 6 - R 50) after having made a cursory search and wherein he says in the second paragraph, second line, *that the tearing or opening strip which you suggested*, denies the above stated claim of the appellee, because Mr. Rieber has definitely established here that he read it as some other than just a tear tape. This fact in itself strikes and destroys

all of the appellee's basic defense because in the opinion of the appellant the appellee must base all of it's defensive structure on this basic assertion. This can be concluded from the rest of this statement.

The appellant contends that in order for the appellee to have created such a base to fabricate its defensive structure it had to necessarily misconstrue the disclosure of August 1955 and show it out of context in vain hope that the real meaning would not become apparant. The act of relying mutely on mistakes in punctuation and capitalization to confirm this contention, with total disregard that the use of a conjecture at the end of the sentence, completely changed the meaning. Then, rather mutely again, implied that the conjecture *if so required* (See paragraph 2 of the August 1955 letter of disclosure, P.T.O., p. 4 - R. 48) was the beginning of a sentence. The use of these conjectures at the end of an ascerted method or means is pertinent to the appellant's style. This is verified by a simple comparison of both the August 1955 and November 1955 letters of description. The idea for an easy release adhesive for the purpose of creating an easy peel sealing strip was both known, desired and taught as can be seen in the third paragraph of the August 1955 letter od description (which the appellee has left out of its brief). It is casually referred to in part elsewhere in the appellee's brief as a papertape covering. A simple repeat of the experiment mentioned in the last paragraph of the August 1955 letter will disclose a firmly held adhesive coated strip that could be peeled easily from the can. Aluminum foil was suggested in place of paper because of it's inherent characteristics. The other designs followed the appellant's desire to create a keyless type can opener. The appellant was trying to interest the appellee by giving examples, not chemical formula or engineering facts. Appellee, strangely enough, has gone so far as to read into the disclosure a *permanent adhesion* (p. 8, A,b),


suggesting a permanent type of adhesive to be used. This is interesting because the appellant is still at a loss as to how the appellee came to this conclusion, but failed to see that the conjecture of, if so required, in the second paragraph of said letter of August 1955 actually described a tape consisting of a single strip of aluminum and if so required, a plastic tape could be adhered thereto.

Conclusion:

It can be readily seen from the foregoing account that appellee not only assumed a duty of trust which it did not keep to the appellant, but also is in breach of its implicit agreement to pay for anything disclosed to it and used substantially, as is contained and provided for in paragraph (G) of the formal agreement. Under the conditions imposed by an implied agreement, the provision set forth in said paragraph (G) would necessarily make it mandatory to compensate the appellant irregardless of where appellee discovered this method as long as appellant had disclosed it prior to said use. Therefore, appellant does not have to prove that it was taken from his disclosures to be compensated, as appellee infers, unless appellee could prove that no such disclosure existed in the August 1955 description. Such proof has been asserted but is without substance because appellee stated (see Appellee's Brief, p. 23) that the appellant *only* disclosed a *multiple tear tape constructure* and that this is the way Mr. George W. Rieber read it. However, we see a direct contradiction to this in Mr. George W. Rieber's own words in the letter of October 26, 1955 (P.T.O. p. 6 - R 50).

Thus, the appellee, having failed to establish that the appellant did not disclose the type of easy opening tape seal in dispute, and consequently

has no excuse or defense for the complaint against it, the appellant affirms its prayer that this court find it's request for reversal of the decision of the court below.


Philip J. Kenney, Appellant, in
propria persona

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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appellant

vs.

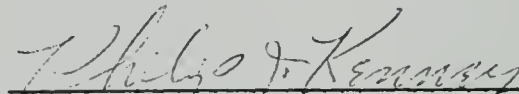
AMERICAN CAN COMPANY,
a corporation,

appellee

No. 22236

CERTIFICATE

I certify that in connection with the preparation of this
Brief I have examined Rules 18, 19, and 39 of the United States Court of
Appeals for the Ninth Circuit and that in my opinion the foregoing brief
is in full compliance with those rules.


Philip J. Kenney, appellant,
perporia persona